APPENDIX

Filed August 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5622

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Appellants,

v.

CITY OF SALEM; LEON JOHNSON, Mayor of the City of Salem; JOHN BURKE, Common Council Member of the City of Salem; ROBERT DAVIS, Common Council Member of the City of Salem; ROBERT ELK, Common Council Member of the City of Salem; BETSY ERHARDT, Common Council Member of the City of Salem; EARL GAGE, Common Council Member of the City of Salem; ROBERT JOHNSON, Common Council Member of the City of Salem; DONALD SHARP, Common Council Member of the City of Salem; JOSEPH WEAVER, Common Council Member of the City of Salem, individually and in their official capacities,
Appellees.

Appeal from the United States District Court
for the District of New Jersey

D.C. Civil No. 92-1137

Argued May 2, 1994

BEFORE: SLOVITER, *Chief Judge,* HUTCHINSON and SEITZ, *Circuit Judges.*

Filed: August 25, 1994

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I.

Plaintiffs appeal a final order of the district court granting summary judgment to defendants in a civil rights action attacking the constitutionality of a city ordinance requiring employees of the city, with certain exceptions, to live therein. Our review is plenary.

II.

The individual plaintiff ("Scull") was employed by the City of Salem, New Jersey ("City") as a laborer. He moved his residence from the city to suburban New Jersey, giving as his reason the health, safety, and welfare of his family. He was notified that such action was in violation of the city's residential requirement and he would be terminated if he did not correct the situation. Scull would not comply and this action to bar his discharge followed.

Section 2 of the Salem Municipal Residency Ordinance recites that

> Except as otherwise provided by law, all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem, are hereby required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein.

Joint Appendix ("JA") 38 (Ordinance #78-3).

The preamble to the ordinance cites the following reasons for the requirement:

> Whereas, said residency will not only reduce the high unemployment rate in the City, but will also improve relations among City employees; enhance the quality of employee performance by greater personal knowledge of conditions and problems in the City; promote a feeling of greater personal interest in the City's progress; reduce the possibility of tardiness and absenteeism; provide a ready availability of trained manpower for emergency situations; and provide unto the City economic benefits. . . .

JA 25.

Salem Blue Collar Workers Association ("Association"), the collective bargaining agent for the blue-collar and clerical employees of the City of Salem, and Scull filed a four-count complaint in the district court seeking, *inter alia,* declaratory and injunctive relief barring enforcement of the ordinance. They alleged that the ordinance violates the Privileges and Immunities Clause of Article IV, § 2 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The parties, then filed cross-motions for summary judgment. The district court held that the ordinance did not violate either constitutional provision and granted summary judgment to defendants. Plaintiffs' appeal followed.

III.

A. The Privileges and Immunities Clause

The Privileges and Immunities Clause of the United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. The purpose of the Clause was to foster a national union by discouraging discrimination against residents of another

state on the basis of citizenship. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

Despite the language of the Clause embracing "each State," the United States Supreme Court has recently held that the Clause may include municipal residency ordinances. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 214-15 (1984). The Court's rationale for this expansive reading of the Clause is based on the relationship between the state and its municipality: since a municipality is granted its power to act from the state, it is as subject to the Clause as the state would be.

1. Standing

The district court granted summary judgment to the City on Scull's privileges and immunities claim because it concluded that he lacked standing. *Salem Blue Collar Workers Ass'n v. City of Salem*, 832 F. Supp. 852, 856 (D.N.J. 1993). In so concluding, the district court relied on language in the Supreme Court's opinion in the *Camden* case. There the Court stated that "[i]t is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens. And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause." *Id.* at 217 (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74-75 (1872)). The implication from this language is that individual New Jersey residents have no standing to challenge a New Jersey municipal ordinance. The district court's ruling here is consistent with the Supreme Court's analysis in *Camden*. *Thus*, Scull lacked standing to assert a privileges and immunities claim.

In contrast to its ruling in regard to Scull, the district court concluded that the Association had standing on its privileges and immunities claim because the complaint alleged that the Association was comprised, *inter alia*, of

members who lived outside the State of New Jersey and others who might live outside the state but for the ordinance.[1] *Salem*, 832 F. Supp. at 856. The Court in *Camden* noted that one of the member associations that belonged to the Council in *Camden* had "at least some members who reside outside New Jersey," 465 U.S. at 212 n.4, and thus had standing. On that basis we agree with the district court's ruling on the Association's standing and proceed to its privileges and immunities claim.

2. Privileges and Immunities Clause Analysis

A valid privileges and Immunities claim requires proof of two elements: (1) whether the interest or right being burdened is "fundamental" and thus, protected by the Clause, *see The Slaughter-House Cases*, 83 U.S. at 76; and (2) if it is, whether there are "substantial" reasons for the discrimination and "whether the degree of discrimination bears a close relation to them." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

We first decide whether the right being burdened—direct public employment—is one that is "fundamental." As the Supreme Court stated in *Baldwin v. Fish & Game*

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[1] The district court reasoned that because the City did not challenge the allegation in its answer to plaintiffs' complaint, it is to be taken as true and thus the Association has standing. The City in its answer stated that it did not possess the knowledge or information to dispute the plaintiffs' allegation regarding the Association's claim to having out-of-state members. The City's answer to that allegation constitutes a denial under the Federal Rules of Civil Procedure. *See* F.R.C.P. 8(b) ("If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial."). However, plaintiffs did submit an affidavit from Mr. Paul Ledford, President of the Association, in which Mr. Ledford certified that the Association includes out-of-state members. JA 162-63 ¶ 3. As this matter was before the district court on summary judgment, the City could not rest on what amounted to a pleading denial to create an issue of material fact on the standing issue. Thus, the Association was entitled to prevail.

Commission, 436 U.S. 371 (1978), "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* at 383. The Court's formulation of the controlling standard is but the beginning of analysis.

Up to this point in time, the Supreme Court has dealt only with prohibitions involving the practice of trades and businesses—private employment. *See, e.g., Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (the practice of law);[2] *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (occupations downstream from state-owned oil and gas interests); *Toomer v. Witsell*, 334 U.S. 385 (1948) (commercial shrimp fishing); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) (merchants); *cf. Baldwin*, 436 U.S. at 388 (rejecting argument that recreational moose hunting is a fundamental right deserving of the Clause's protection).

The focus of our analysis is on the proposition that the right to pursue a "common calling" is within the purview of the Privileges and Immunties Clause. *Hicklin v. Orbeck*, 437 U.S. at 524 (stating that the "protection of the Clause is strongly supported by this Court's decisions holding violative of the Clause state discrimination against

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[2] The Court in *Piper* rejected arguments that lawyers are not protected by the Clause holding, *inter alia*, that the " 'activities of lawyers play an important part in commercial intercourse.' " *Piper*, 470 U.S. at 281 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975)). The *Piper* Court quoted Justice Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), in an attempt to define what "fundamental rights" are protected by the Clause:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal . . . ."

Piper, 470 U.S. at 281 n.10 (quoting *Corfield*, 6 F. Cas. at 552).

nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State"); *Toomer*, 334 U.S. at 403 (commercial shrimping is within the scope of the Clause).

Because of the commercial nature of the term "common calling," early Court decisions looked to the Commerce Clause for guidance in their analyses, citing the "mutually reinforcing relationship between the Privileges and Immunities Clause of Article IV § 2, and the Commerce Clause." *Hicklin*, 437 U.S. at 524.[3] In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), the Court reviewed, under the Commerce Clause, the constitutionality of an executive order issued by the Mayor of Boston that required all construction projects funded in whole or in part by city funds to employ a work force at least half of whom were residents of the city. The Court held that the City was acting in a proprietary capacity and was a market participator, not a market regulator, and therefore was not in violation of the restraints of the Commerce Clause. It is significant to note that in dicta the Court said that the executive order affected the contractual relationship between the contractors and their employees, and as such, the employees were actually "working for the city." *Id.* at 211 n.7. Thus, they did not have the benefit of the Privileges and Immunities Clause when Boston favored its own citizens.

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[3] The Court noted that the origin of both clauses is found in the Fourth Article of the Articles of Confederation. In relevant part, that Article states:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . . .

Hicklin, 437 U.S. at 532 n.16.

In *Camden,* the Supreme Court came close to deciding the issue of whether public employment is a "fundamental" privilege protected by the Privileges and Immunities Clause. *Camden* involved a challenge to a city ordinance that required at least 40% of the employees of the contractors and subcontractors working on city projects to be Camden residents. The Court stated that the threshold determination was "whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.'" *Camden,* 465 U.S. at 218 (quoting *Baldwin,* 436 U.S. at 388).

The Court refused to "mechanically" adopt the Commerce Clause analysis used in *White. Id.* at 219.[4] The Association contends that the Court's rejection of the *White* rationale signals a rejection of the public/private distinction in the area of employment. Closer scrutiny of the Court's reasoning in *Camden,* however, suggests otherwise.

Despite the Court's refusal to apply the *White* analysis, the public/private distinction survives as we read the *Camden* decision. *Camden* first stated that the pursuit of a common calling is a fundamental privilege protected by the Clause, *id.* at 219, but then drew a clear distinction between public and private employment by stating that "[p]ublic employment . . . is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling," *id.*

Although *Camden* refers to public employment as a "subspecies" of "common callings," the public/private distinction can be justified on the basis of the history of the language associated with the clauses. The Privileges and

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[4] The Court declined to address the merits of the privileges and immunities challenge in *White* because the lower court did not reach the issue. *Camden,* 465 U.S. at 214 n.7.

Immunities Clause traces its origin to the language employed in the Fourth Article of the Articles of Confederation. That Article used terms that were referable to private employment, *e.g.*, "trade" and "commerce." *See* David S. Bogen, *The Individual Liberties Within the Body of the Constitution: A Symposium: The Privileges and Immunities Clause of Article IV*, Case W. Res. L. Rev. 794, 831 (1987) (suggesting that "[d]espite uncertainty, one function of article IV . . . remained clear: it prohibited states from imposing any restriction not applicable to residents on nonresidents engaged in trade or commerce").

When the articles of the Constitution were drafted, the language of both the Privileges and Immunities Clause and the Commerce Clause was taken from the Fourth Article of the Articles of Confederation. It is on this historical basis that the distinction between public and private employment remains viable here. *See* Thomas H. Day, Note, *Hiring Preference Acts: Has the Supreme Court Rendered Them Violations of the Privileges and Immunities Clause?*, 54 Fordham L. Rev. 271, 278 (1985) (discussing the distinction the Court has drawn between private and government employment); *see also* Bogen, *supra* at 856 (stating that "[t]he right to engage in a trade or business is a privilege or immunity of citizenship"); Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1129 (1988) (noting that early cases striking down state laws under the Privileges and Immunities Clause involved the "core privileges of trade and commerce").

Based on this historical foundation, we ask whether private or public employment is implicated by Scull's employment with the City of Salem. Our analysis turns on the nature of the employment relationship between employer and employee, not the character of the job being performed.

The Court in *Camden* held that a private employment relationship existed there. In *Camden* the contractors and

subcontractors were working under contract to the City and being paid in part or whole with city funds. *White* suggested that the employees of the contractors could be considered to be "working for the city" and therefore, have no claim. The *Camden* Court, however, refused to apply *White*'s Commerce Clause reasoning citing the employees' right to "seek employment with . . . *private employers*." *Id.* at 221 (emphasis added).[5]

Our case is distinguishable by comparing the direct and indirect nature of the government employment. The employment in our case is *directly* with the governmental entity—there is no intervening private employment as there was in *White*, where the contractors and subcontractors were under contract to the City of Boston, but the individual employees were under contract to the contractors and subcontractors. The *Camden* court recognized this distinction when it concluded that "[t]he opportunity to seek employment with such *private employers* is 'sufficiently basic to the livelihood of the Nation,' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city." *Id.* at 222 (quoting *Baldwin*, 436 U.S. at 388).

We agree with the district court in this case that the public/private distinction has not been abandoned. Based on our reading of the Supreme Court cases in this area, we hold that direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause of Article Four.

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[5] As the district court correctly noted, the Court's holding in *Camden* that there was private employment is "consistent with the Court's view that the Commerce Clause focuses on the perspective of the state or local government while the Privileges and Immunities Clause focuses on the perspective of the individual." 832 F. Supp. at 860 n.4; *see generally* Bogen, *The Privileges and Immunities Clause, supra.*

In light of our holding that there is no fundamental right implicated here, it is unnecessary for this court to discuss the second issue of "substantial relatedness." [6]

B. Equal Protection Challenge

Plaintiffs [7] argue in the alternative that the ordinance, as it is applied by the City, violates the Equal Protection Clause of the Fourteenth Amendment.

At the outset, plaintiffs concede that the "rational basis" test is to be used in the analysis of their due process claim because the ordinance does not affect a fundamental right, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), and does not discriminate against a suspect class.

The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). To withstand constitutional scrutiny under the rational basis test, the classifications created by the legislation "must be rationally related to a legitimate governmental purpose." *Id.* at 446.

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[6] We note that the Supreme Court has stated that "the privileges and immunities clause is not an absolute." *Toomer*, 334 U.S. at 396. Further, the Court has pointed out that the "States should have considerable leeway in analyzing local evils and in prescribing appropriate cures," *id.*, but the court must determine whether nonresidents are the source of the evils that do exist and whether the actions taken by the states are reasonably related to curing them, *id.*; *see Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). As was the case in *Camden*, there was no trial, thus there were no findings of fact. If we had held public employment to be within the scope of the Clause, remand would have been necessary to permit the district court to make findings on this issue. *See Camden*, 465 U.S. at 223.

[7] Although Scull does not have standing to challenge the ordinance as violative of the Privileges and Immunities Clause, he does have standing to assert an equal protection challenge.

The Supreme Court has held that municipal residency requirements for maintaining employment are not irrational. *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 647 (1976); *see also Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972) (dismissing appeal for failure to present a substantial federal question by challenging a Detroit residency requirement for police officers), *dismissing appeal from* 190 N.W.2d 97 (Mich. 1971) (en banc). The Supreme Court of New Jersey has also held that municipal residency requirements do not violate equal protection guarantees. *Kennedy v. City of Newark*, 148 A.2d 473 (N.J. 1959) (rejecting a state constitutional challenge); *Trainor v. City of Newark*, 368 A.2d 381 (N.J. Super. Ct. App. Div. 1976).

Despite the foregoing principles, plaintiffs have raised several equal protection challenges which we will address in turn.

1. State Law Exceptions

The City's residency ordinance states that all officers and employees of the City are to be residents but the New Jersey Legislature has enacted several statutes that exempt certain employees from municipal residency requirements.[8] These exemptions appear to leave the residency

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[8] In particular, N.J.S.A. 40A:14-9.1 exempts firefighters, N.J.S.A. 40A:14-122.1 exempts police officers, and N.J.S.A. 18A:26-1.1 exempts teachers from the residency requirements. Lastly, some officer posts and appointed positions may be held by nonresidents. N.J.S.A. 40A:9-1.1 (nonresident may be appointed director of public safety); N.J.S.A. 40A:9-11 (nonresident may be counsel, attorney, engineer, health officer, auditor or comptroller of the municipality). *See also*, Municipal Residency Ordinance #78-3 (exempting certain positions requiring specialized education and talent and those individuals "grandfathered" in under the ordinance) (JA 38-39).

The City contended in its brief, and at oral argument, that these exemptions should not be considered applicable to the City of Salem. As a "technical" matter, the City does not have any paid firefighters so the state exemption does not apply. Further, the

requirement applicable only to blue-collar and clerical employees of the City.

Although the governing state statutes exempt many employees from the ordinance, their validity is not before this court. Thus, we focus, as the district court did, solely on whether there is a "rational basis" for the City's residency requirement. The controlling issue is whether a legitimate governmental purpose is served by the classification of the ordinance, keeping in mind that we will only set aside the ordinance's classifications "if no grounds can be conceived to justify them." *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969). An examination of the purposes set forth in the preamble to the ordinance under attack reveal grounds to support the ordinance, *e.g.*, "provide unto the City economic benefits". We conclude that it serves a legitimate governmental purpose.

2. Grandfather Clause Exception

Section 3(d) of the Municipal Residency Ordinance exempts from the residency requirement "[a]ny person employed by the City who resides outside the City as of the date of the adoption of this ordinance." JA 39. Appellants claim that this is an irrational application of the residency requirement.[9]

City does not employ any teachers or librarians in the context required for those exemptions to apply. Lastly, the City avers that although there is an exemption for the Public Safely Director, the City does not have such a position.

[9] Appellants offer as an example Mr. Kenneth Homan, Scull's former supervisor. Mr. Homan was "grandfathered" in because he began working for the City prior to the enactment of the City ordinance. Appellants suggest that Mr. Homan should have been living in the City as required by the state law at that time that required all "officers" reside within their respective municipalities. *See* N.J.S.A. 40A:9-1 (repealed June 30, 1978). It is interesting to note, however, that even if Mr. Homan was not "grandfathered" in under the new ordinance, he would have been exempt from the

The Supreme Court has approved of "grandfather" clauses that protect individuals and interests from changes in the law that would destroy established reliance on previously valid regulations and laws. *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding in the face of an equal protection challenge a grandfather clause that exempted certain street vendors from new regulations in the French Quarter). Further, we note that at least two courts of appeals have upheld the validity of such clauses under a rational basis analysis. *Lorenz v. Logue*, 611 F.2d 421, 423 (2d Cir. 1979) (per curiam) ("By not applying [the residency requirement] to pre-1978 employees who never received any warning of a residency requirement when they took their jobs, the City protected these employees' legitimate expectations." (emphasis in original)); *Simien v. City of San Antonio*, 809 F.2d 255, 257 (5th Cir. 1987) ("The grandfathering of other employees based on the length of their employment is a constitutional means to gradually achieve a workforce that resides in the city."). We also conclude that the exemption of those employees who were employed prior to the adoption of the ordinance and who lived outside the City does not render the ordinance unconstitutional.[10] We find no irrationality in this grandfather clause.

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ordinance by virtue of N.J.S.A. 40A:9-11, which exempts "health officers." As Mr. Homan was Superintendent of the municipal water supply and waste water treatment facility and required to be licensed as a health officer pursuant to N.J.S.A. 26:1A-41, he would be exempt. *See generally* N.J.S.A. 26:1A-7 (granting the State Department of Health jurisdiction over matters relating to sewage and waste water).

[10] The ordinance's grandfather exemption is not absolute, however. Section 3(d) states that if the grandfathered employee "subsequently makes his residence within the City [he] shall not be exempt from the requirements of this ordinance."

C. Fourteenth Amendment Due Process Challenges

Plaintiffs raised five claims of due process violations under the Equal Protection Clause in the district court. The district court held that each was without merit and granted summary judgment to the City. Appellants' brief presents only two of the original five claims for our review.

1. Selective Enforcement

Plaintiffs claim that although the ordinance had been in effect for more than fourteen years at the time of Scull's notice of violation, there was an absence of evidence that it was invoked, which they argue shows that it was being selectively enforced against Scull. The City, however, provided evidence of enforcement of the ordinance against an employee who chose to reside outside of the City. JA 188-91. Because the City was able to negate the appellants' claim that the ordinance was never enforced, the district court properly granted summary judgment. The appellants have not met their burden, which requires them to offer evidence "that the [municipality] intentionally and purposefully discriminated against [Scull] by failing to prosecute other similarly situated persons." *United States v. Torquato,* 602 F.2d 564, 570 (3d Cir.), *cert. denied,* 444 U.S. 941 (1979). Thus the City was entitled to summary judgment.

2. Notice of the Requirement

Plaintiffs next contend that Scull had not been given written or oral notice of the residential requirement when he was appointed to his position. The record, however, contains evidence that copies of the ordinance were posted in work areas so as to give notice to employees. JA 186.[11] We note further that Scull was given ample time

[11] Despite our hesitation to point to such hearsay evidence, we recognize that the summary judgment record contains an unchallenged affidavit of Mr. Thomas G. Smith, Sr., Salem's Municipal

and opportunity to avoid termination once he had been given notice of his violation.[12] Our review of the record reveals that Scull has failed to raise an issue of material fact that would require a reversal of the district court's grant of summary judgment.

IV.

We will affirm the district court's order granting the defendants' summary judgment and denying plaintiffs' motion for summary judgment.

Administrator, that states that Scull contacted the president of the Association prior to moving out of the City to inquire into the requirements of the ordinance. JA 183. Mr. Smith's affidavit avers that the president disclosed that Scull contacted him and that the inquiry was revealed during grievance proceedings that took place prior to this suit. *Id.*

[12] Scull was given an initial period of ten days to correct his situation by his employer but this period was later extended to six months. Ultimately, the time requirement was stayed pending the outcome of these proceedings.

SLOVITER, *Chief Judge*, dissenting.

It is ironic that notwithstanding the intent of the Privileges and Immunities Clause to "fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell,* 334 U.S. 385, 395 (1948), the motivation to retain privileges for one's own citizens has remained strong. Thus, the history of the Privileges and Immunities Clause, albeit somewhat sparse, consists of a series of cases in which obstacles erected by parochialism but sought to be justified in the name of valid local interests generally have been found wanting when measured against the goal of national unity.

The issue before us is apparently one of first impression for an appellate court: whether the Clause applies to statutes burdening purely public employment. Because I conclude, contrary to my colleagues, that it does apply, I respectfully dissent.

I.

The majority bases its holding that the Privileges and Immunities Clause is inapplicable in this case on its conclusion that "direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause of Article Four." Maj. Typescript Op. at 10. It recognizes that the Supreme Court cases have dealt only with private employment in this context. The majority infers, however, based on language it quotes from the Court's opinion in *United Building & Construction Trades Council v. Mayor & Council of Camden,* 465 U.S. 208 (1984) (hereinafter *Camden*), that the Supreme Court was establishing an unwavering distinction between private and public employment. However, *Camden,* rather than providing the basis for a restrictive ruling, is a case that significantly expanded the scope of the Privileges and Immunities Clause by applying it to restrictions placed on employment of nonresidents by private employers on publicly-funded work projects. Therefore, I believe that the majority's conclusion does not follow from *Camden.*

There can be no question that among the privileges encompassed in the Privileges and Immunities Clause is that of employment. The centrality of commerce among the protections provided by that Clause is well-established, notwithstanding the focus of the Court in an early discussion on other attributes of citizenship. In *Paul v. Virginia,* the Court stated the purpose of the Clause is:

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits the discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

75 U.S. (8 Wall.) 168, 180 (1869).

Thus, although equality of commercial opportunities among citizens of different states was primarily seen as the function of the Commerce Clause, there were early cases that relied on the Privileges and Immunities Clause to strike state statutes that discriminated against efforts of nonresidents to ply their trade. *See, e.g., Blake v. McClung,* 172 U.S. 239 (1898) (invalidating state law which granted preference to resident creditors of insolvent foreign corporations); *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871) (striking Maryland statute which established discriminatory licensing fee scheme based on residency for the sale of out-of-state goods).

Justice Brennan has dated the analytical framework used in the modern cases applying the Clause to *Toomer v. Witsell,* 334 U.S. 385 (1948), holding violative a South Carolina statute requiring nonresidents to pay a shrimp harvesting licensing fee one hundred times greater than that charged residents. *See also Mullaney v. Anderson,* 342 U.S. 415 (1952) (invalidating commercial fishing licensing fee which was ten times greater for nonresidents than for residents of Alaska).

Although the majority rationalizes its holding on the survival of a public/private distinction, in fact the Supreme Court has consistently rejected public ownership of assets as a sufficient justification in itself for discriminatory rules. In *Hicklin v. Orbeck,* 437 U.S. 518 (1978), Alaska sought to justify its preference for employing Alaska residents in projects developing Alaskan oil or gas on the ground that "the oil and gas that are the subject of Alaska Hire are *owned* by the State." *Id.* at 528. The Supreme Court rejected that contention, stating, "[w]e do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause." *Id.*

Even in the one recent Supreme Court case to uphold a state preference, *i.e.,* Montana's rule charging its residents a lower fee than charged to nonresidents for a license to hunt elk for sport, the Court noted that despite the early cases giving states the right to preserve their wildlife bounty for their citizens alone, "[i]n more recent years . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' . . . is by no means absolute." *Baldwin v. Fish & Game Comm'n of Montana,* 436 U.S. 371, 385 (1978). The Court cautioned that "a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." *Id.* at 386. Thus, the rationale that the Court used in sustaining

Montana's licensing scheme was that elk hunting was not a "basic and essential activit[y], interference with which would frustrate the purposes of the formation of the Union," *id.* at 387, rather than one based on public ownership of the wilderness and its bounty.

It was in this stage of the analytic development of the Clause that the Court decided *Camden,* a decision noteworthy on several grounds. Before that decision, the Court had not applied the Privileges and Immunities Clause to municipal ordinances. In *Camden,* the Court ruled that because "a municipality is merely a political subdivision of the State from which its authority derives . . . what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State." 465 U.S. at 215. Moreover, it rejected the New Jersey Supreme Court's conclusion "that the Privileges and Immunities Clause does not apply to an ordinance that discriminates solely on the basis of *municipal* residency." *Id.* The Court applied a common sense approach, recognizing that "[a] person who is not residing in a given State is *ipso facto* not residing in a city within that State." *Id.* at 216-17. Therefore, "an out-of-state citizen who ventures into New Jersey will not enjoy the same privileges as the New Jersey citizen residing in Camden." *Id.* at 217. Thus, the Camden ordinance was subject to constitutional review under the Clause at the behest of out-of-state residents.

The other landmark ruling to emerge from the *Camden* opinion was, of course, the holding that the City of Camden's hiring preference ordinance, requiring that at least forty percent of the employees of contractors and subcontractors working on city construction projects be Camden residents, was subject to the strictures of the Privileges and Immunities Clause. The ruling was particularly noteworthy because the preceding year the Court sustained an analogous executive order of the mayor of Boston against a challenge under the Commerce Clause. *See White v. Massachusetts Council of Constr. Employ-*

ers, Inc., 460 U.S. 204 (1983). The Court explained, however, that "the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace [which defeated the Commerce Clause challenge in *White*] does not preclude the possibility that those conditions violate the Privileges and Immunities Clause." *Camden*, 465 U.S. at 220.

Accordingly, the Court turned to the "threshold matter" of "whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.' " *Id.* at 218 (citation omitted). The majority and I differ in our interpretation of the Court's analysis in response to this query.

The Court first stated that "[c]ertainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *Id.* at 219. It continued, in the sentence the majority finds dispositive, "[p]ublic employment, however, is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling." *Id.* The Court then noted that it had held there is no fundamental right to government employment for purposes of the Equal Protection Clause, citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam), and referred to its decision in *White* holding that the Commerce Clause did not preclude such municipal favoritism of residents in employment.

Notwithstanding all of the above, the Court proceeded to hold that the Privileges and Immunities Clause was applicable. The Court distinguished the Commerce Clause analysis from that applicable to the Privileges and Immunities Clause, stating that "[i]t is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." *Id.* at 220. I read the Court's opinion in *Camden* as holding that notwithstanding the inapplica-

bility of other clauses of the Constitution to a municipal residency requirement, such a requirement trenches on the *raison-d'etre* of the Privileges and Immunities Clause.

Consistent with its decision in *Hicklin,* the *Camden* Court rejected the argument that the public ownership of the assets used for the municipal projects immunized the residency requirement from Privileges and Immunities scrutiny, noting that in its earlier cases it had concluded "that the State's interest in controlling those things it claims to own is not absolute." *Id.* at 221. It continued,

> Much the same analysis, we think, is appropriate to a city's efforts to bias private employment decisions in favor of its residents on construction projects funded with public moneys. The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. *But it does not remove the Camden ordinance completely from the purview of the Clause.*

Id. (emphasis added).

The *Camden* opinion suggests, even if it does not actually hold, that even a direct municipal residency requirement or preference for municipal employment will be subject to scrutiny under the Privileges and Immunities Clause. Although the Court did indeed comment that "[t]he opportunity to seek employment with [private contractors and subcontractors engaged in public works] is 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city," *id.* at 221-22 (citation omitted), this does not signify that when faced with a direct employment issue, the Court would accept the distinction made by the majority.

The expansive reading the Court gave to the Clause suggests to the contrary, particularly in light of the undisputed fact that in recent times, as public employment continues to expand, nearly one-sixth of all jobs in New Jersey, as well as one-fifth of those throughout the country, are held by public employees. App. at 138-44 (citing data from Bureau of Labor Statistics, U.S. Dept. of Labor, *Employment, Hours, and Earnings, States and Areas, Data for 1987-1992* 384 (1992) (documenting that of a total of 3,493,100 nonfarm employees in New Jersey, 566,700 or 16.2% were government employees and that nationally, of a total of 89,930,000 nonfarm employees, 18,379,000 or 20.4% were government employees)). In terms of its economic importance, it can hardly be doubted that government employment surpasses shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948), commercial fishing, *Mullaney v. Anderson*, 342 U.S. 415 (1952), trade of foreign goods, *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871), and the practice of law, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), all trades sufficiently fundamental to warrant the Clause's protection.

I do not suggest that a residence requirement for municipal employees necessarily violates the Privileges and Immunities Clause. This is, as the Court noted in *Camden*, only the first step. Once it is determined that the Privileges and Immunities Clause is applicable, the court must then apply the *Toomer* analysis, under which it must be determined whether there is a "substantial reason" for the difference in treatment and "whether the degree of discrimination bears a close relation" to those reasons. *See Toomer*, 334 U.S. at 396. The majority's analysis pretermits that inquiry. The result is that a substantial number of jobs will be permanently foreclosed from out-of-state residents for what may be insubstantial reasons. This is a result that I believe is incompatible with the Privileges and Immunities Clause.

II.

The appellants do not challenge the legal principle eunciated by the majority that municipal residency requirements for public employment do not on their face violate the Equal Protection Clause. Their objection is a different one, in that they pose a challenge to the ordinance as it has been applied. Essentially their claim is that the cumulative effect of the various exemptions from the residency requirement, both statutory and in practice, makes any distinction between residents and nonresidents arbitrary or irrational.

Thus, the appellants argue that "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational" cannot be deemed rational. Appellants' Brief at 37 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985)). I do not understand the majority to challenge the contention that in the main it is the clerical and blue collar workers of the city who are required to be Salem residents, while employees who are better connected politically, such as police, supervisors, and other white collar workers, work for the city but reside outside of its borders. The majority explains that each of the exemptions has a justifiable explanation, such as an exemption pursuant to state statute or a legitimate grandfather clause. The majority's analysis, however, fails to take into consideration the cumulative effect of the exemptions. Even if each exemption is itself explicable, together they produce a patchwork of exemptions that throw into question the rationality of the scheme.

I am, above all, troubled by the allegation that the residency requirement lay dormant until applied against appellant Scull when he questioned the conduct of a volunteer firefighter at the scene of a fire. *See* App. at 173. I find the majority's response, that the residency requirement was also enforced against another employee, unpersuasive. Nonetheless, because I believe that this is

an appropriate case for decision of the still undecided question of the applicability of the Privileges and Immunities Clause to public employment, I rest on that ground alone for my position that the order of the district court should be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[Filed Sep. 13, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 92-1137

SALEM BLUE COLLAR WORKERS ASSOCIATION and STEPHEN SCULL,

Plaintiffs,

v.

THE CITY OF SALEM; MAYOR and COMMON COUNCIL OF SALEM; MAYOR LEON JOHNSON; CITY OF SALEM COMMON COUNCIL MEMBERS, JOHN BURKE; ROBERT DAVIS; ROBERT ELK; BETSY ERHARDT; EARL GAGE; ROBERT JOHNSON; DONALD SHARP; and JOSEPH WEAVER, individually and in their official capacities,

Defendants.

OPINION

GERRY, Chief Judge

This lawsuit challenges the City of Salem's municipal residency ordinance, which requires city employees to reside in the city. Plaintiffs claim that this ordinance violates the Privileges and Immunities Clause of Article IV of the United States Constitution in addition to various other provisions of the United States and New Jersey Constitutions. Plaintiffs are the Salem Blue Collar Workers Association, the collective bargaining agent for blue collar and clerical workers employed by the City of Salem, and Stephen Scull, a laborer for the City and member of the union who has been threatened with termination because he lives outside the city. They seek declaratory relief, preliminary and permanent injunctive relief, and damages against the City of Salem and various officials thereof.

The case is presently before the court on cross-motions for summary judgment.

I. *Facts*

The following facts are undisputed. The Salem residency ordinance was enacted in 1978 and provides that

> all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem are hereby required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein.[1]

The ordinance has been interpreted by the City to apply only to those hired or appointed after its effective date, thus effectively "grandfathering" those who were previously employed by the City and live elsewhere. The ordinance authorizes the Mayor and Common Council "for good and sufficient cause" to waive the ordinance where residence outside of the city is required due to the health of the employee, due to the nature of the employment, or where "specialized talent or technique is required, such as professional services of engineers or accountants."

The ordinance further requires that as "a condition of employment, each and every employee or prospective employee shall be required to execute an affidavit, in [a] form prescribed by the Mayor and Common Council, setting forth . . . that [the] employee is domiciled in the City." It also provides that any employee who is not a resident is to be given "a ten (10) day notice setting

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[1] At the time the ordinance was enacted, all elected and appointed officers of municipalities in New Jersey were required to be residents of such municipalities by virtue of state law, N.J. Stat. Ann. 40A:9-1. A few months later, however, that statute was repealed and replaced by N.J. Stat. Ann. 40A:9-1.3, which provides that "the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein."

forth the charge that the employee is not a bona-fide resident" and therefore faces discharge.

Since the ordinance's enactment in 1978, no one has been fired for failure to comply with it.[2] It has never been discussed or negotiated with the Union, and there is no reference to it in the parties' collective bargaining agreement. The Mayor and Common Council have never promulgated an affidavit regarding residency nor required any employee or prospective employee to execute such an affidavit, as provided for in the ordinance. The City's standard employment application asks for the prospective employee's address and includes a certification as to the accuracy of the information provided. The application does not indicate that all employees are required to be city residents, and the City provides nothing in writing to any new employee prior to hiring that indicates that municipal employment is conditioned on city residency.

The City's police officers, firefighters, and public school teachers[3] are exempted from the ordinance by operation of state law. *See* N.J. Stat. Ann. 40A:14-122.1 (precluding imposition of municipal residency ordinances on police officers); N.J. Stat. Ann. 40A:14-9.1 (firefighters); N.J. Stat. Ann. 18A:26-1.1 (teachers). Additionally, many skilled and supervisory personnel have been informally exempted from the ordinance; but none of these employees have sought or received official waivers from the Mayor and City Council.

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[2] Defendants have submitted an affidavit stating that in 1991 the Municipal Administrator confronted an employee who worked for the City as a clerk typist with an allegation that she no longer resided in the City, in violation of the ordinance. According to the affidavit, she chose to resign rather than face charges under the ordinance.

[3] Defendant contends that teachers are not municipal employees, but are instead employed by the Salem Board of Education, which is an autonomous agency.

Plaintiff Salem Blue Collar Workers Association is the collective bargaining agent for blue collar and clerical employees of the City of Salem. Some members of the Association live outside the State of New Jersey. Additionally, other members of the Association might be willing to reside outside the State of New Jersey but for the City's residency ordinance.

Plaintiff Stephen Scull was hired by the City as a laborer on November 20, 1989, at which time he was a resident of the city. He was not asked to sign an affidavit evidencing that he was a resident of the city, nor was he informed by any city official of the residency requirement. At some time thereafter, Mr. Scull moved out of Salem to another location in New Jersey because of concern for the health and safety of his children. On January 31, 1992, Kenneth Homan, Superintendent of the Salem Water and Sewerage Department, told Mr. Scull that because he was residing outside the city he was in violation of the municipal residency ordinance. He was informed that he had thirty days in which to correct the violation, at which time termination proceedings would begin.

On March 9, 1992, the Salem Blue Collar Workers Association filed an Unfair Practice Charge and an Order to Show Cause before the New Jersey Public Employment Relations Commission, contending that the City of Salem violated the New Jersey Employer-Employee Relations Act, N.J. Stat. Ann. 34:13A-5.4(a)(1) & (5). On March 17, 1992, plaintiffs filed this action pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201. On April 9, 1992, the City agreed to be temporarily restrained from disciplining Stephen Scull or any other member of the Salem Blue Collar Workers Association for any violation of the residency ordinance until further order of the New Jersey Public Employment Relations Commission. Action on the Association's unfair practice charge before the Commission was postponed

indefinitely pending the outcome of plaintiffs' constitutional challenge in this court.

II. *Discussion*

Under Fed. R. Civ. P. 56, summary judgment is appropriate only if all the probative materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g., Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983). Although the record before us contains numerous disputes as to issues of fact, none of these are material to the legal analysis of plaintiffs' claims. Thus, based on the undisputed facts presently before the court, we conclude as a matter of law that all of plaintiffs' claims must fail.

Plaintiffs primarily rest their challenge on the Privileges and Immunities Clause of Article IV of the United States Constitution, but they also make arguments under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the equivalent clauses of the New Jersey Constitution. We address each claim in turn.

A. *Article IV Privileges and Immunities Clause*

The Privileges and Immunities Clause of Article IV states that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause was intended to foster a national economic union by limiting a state's power to discriminate against residents of other states. *See, e.g., Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985); *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948); *Paul v. Virginia*, (8 Wall) 168, 180 (1869). The Supreme Court has relied on the Privileges and Immunities Clause to invalidate a variety of state statutes that place unreasonable burdens on out-of-state citizens and whose sole

basis for classification is place of residency. *See, e.g., Piper,* 470 U.S. 274 (New Hampshire's residency requirement for admission to the bar); *Hicklin v. Orbeck,* 437 U.S. 518 (1978) (Alaskan statute requiring all contracts in connection with construction of Alaskan oil and gas pipelines to give preference in hiring to Alaskan residents); *Austin v. New Hampshire,* 420 U.S. 656 (1975) (commuter income tax imposed only on out-of-state residents who work in state); *Doe v. Bolton,* 410 U.S. 179 (1973) (state statute prohibiting abortions performed on out-of-state residents); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (statute of Territory of Alaska charging non-residents forty-five dollars more for commercial fishing license than residents); *Toomer,* 334 U.S. 385 (South Carolina statute requiring non-residents to pay one hundred times more for commercial shrimp license than residents); *Ward v. Maryland,* 79 U.S. (12 Wall) 418 (1871) (Maryland statute requiring only non-resident merchants to obtain license to practice their trade, charging higher fees to non-resident than to resident merchants, and prohibiting merchants from using non-resident salesmen to sell goods in Baltimore).

Even though a municipal ordinance, such as Salem's, discriminates against in-state residents who live outside the city in addition to out-of-state residents, the Supreme Court has held that the Privileges and Immunities Clause is no less applicable to laws that discriminate on the basis of municipal residency than it is to laws that discriminate on the basis of state residency. *See United Bldg. & Constr. Trades Council v. Mayor & Council of Camden,* 465 U.S. 208, 215-218 (1984). In so holding, the Court noted that while "[in-state] residents at least have a chance to remedy at the polls any discrimination against them[,] [o]ut-of-state citizens have no similar opportunity." *Id.* at 217 (citations omitted). Accordingly, out-of-state residents burdened by a municipal residency ordinance must be accorded the protections of the Clause.

Thus, while the Court held that municipal residency ordinances are subject to challenge under the Clause, it also made clear that such a challenge may only be brought by out-of-state residents. "[T]he disadvantaged [in-state] residents have no claim." *Id.* at 217. The complaint alleges that plaintiff, Stephen Scull, lives outside Salem but inside the State of New Jersey. Accordingly, as an in-state resident, he has no claim against the Salem ordinance under the Privileges and Immunities Clause. Summary judgment on his claim will therefore be granted in favor of defendants.

The Salem Blue Collar Workers Association asserts that it has members who live outside the state as well as members who might live outside the state but for the ordinance. Since this factual assertion remains unchallenged by defendants, the union does have standing to assert a Privileges and Immunities Clause claim. *See id.* at 212, n.4 (Privileges and Immunities Clause challenge to municipal ordinance cognizable where plaintiff union "has at least some members who reside outside New Jersey"). Accordingly, we proceed to consider whether the union's rights under the Clause are violated by the Salem ordinance.

The first step in determining whether a statute or ordinance violates the Privileges and Immunities Clause is to inquire "whether the ordinance burdens one of those Privileges and Immunities protected by the Clause." *United Bldg. & Constr. Trades Council,* 465 U.S. at 218. Not all discrimination against out-of-state residents is prohibited. It is only with respect to those 'privileges' and 'immunities' that are "sufficiently basic to the livelihood of the Nation" and that "bear[] on the vitality of the Nation as a single entity," *Baldwin v. Fish & Game Comm'n,* 436 U.S. 371, 383, 388 (1978), that "a State must accord residents and nonresidents equal treatment." *Piper,* 470 U.S. at 279. States are, for example, free to restrict voting rights to those who are citizens, and free to require those who

run for public office to be citizens. *See Baldwin*, 436 U.S. at 383. Additionally, the Supreme Court has held that it is permissible for a state to charge more to a non-resident than to a resident for a recreational elk-hunting license, because elk-hunting is not a "means of a livelihood" and thus not fundamental to a national economic union. *See id.* at 388.

On the other hand, statutes that burden the ability of non-residents "to ply their trade, practice their occupation, or pursue a common calling within the State," *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), repeatedly have been held to come within the purview of the Clause. It is plaintiffs' contention that the Salem ordinance falls within this category. Defendants argue, however, that ordinances that burden public employment are fundamentally distinguishable from ordinances that burden private employment, and that only the latter come within the purview of the Clause.

No court has directly addressed this question of whether the Clause applies to statutes burdening purely public employment. Those cases that have found employment to be protected by the Clause have generally involved government regulation of private employment. *See, e.g., Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (practice of law); *Piper*, 470 U.S. 274 (same); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (commercial fishing); *Toomer*, 334 U.S. 385 (commercial shrimp harvesting); *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871) (merchants); *O'Reilly v. Board of Appeals*, 942 F.2d 281 (4th Cir. 1991) (driving taxi cabs); *Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985) (insurance consulting); *Tangier Sound Watermen's Assoc. v. Douglas*, 541 F. Supp. 1287 (E.D.Va. 1982) (commercial fishing). Additionally, the language used to describe the nature of the privileges and immunities protected by the Clause often uses words such as "commerce," "commercial," "trade," and "business," which seem to suggest private

commercial activity as opposed to public or government employment. For example, the fourth article of the Articles of Confederation, from which the Privileges and Immunities Clause was derived "with no change of substance or intent," *Austin v. New Hampshire,* 420 U.S. 656, 660-61 (1975), specifically referred to "the privileges of trade and commerce." Additionally, the Supreme Court has characterized the activities covered by the Clause as "lawful commerce, trade or business," *Ward v. Maryland,* 79 U.S. (12 Wall) 418 (1871), and "doing business," *Toomer v. Witsell,* 334 U.S. 385, 396 (1948).

None of this is dispositive, of course. We cite these cases not as conclusive precedent, but simply to illustrate an apparent underlying assumption in the cases interpreting the Privileges and Immunities Clause that the types of "trades," "occupations," and "common callings" with which the Clause is concerned are those that are directly involved with the private realm of business and commerce rather than the public realm of government. This supposition has been borne out by the Supreme Court's treatment of the public/private distinction in two more recent cases analyzing claims under the Clause, *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), and *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden,* 465 U.S. 208 (1984). While not directly on point, the Court's reasoning in these two cases rests on the precept that purely public employment is outside the reach of the Clause.

In *Piper* the Court considered the applicability of the Clause to the practice of law in the context of a challenge to a rule restricting admission to the bar to state residents. The language of that opinion indicates that it was the private nature of the employment involved that rendered it subject to Privileges and Immunities Clause scrutiny. The Court concluded that the practice of law was a "privilege" within the meaning of the Clause because it is "important to the national economy" and because "the 'activi-

ties of lawyers play an important part in *commercial intercourse.*'" *Id.* at 281 (emphasis added) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

The Court rejected an argument that the Clause should be inapplicable to lawyers because they are "officer[s] of the court" who "exercise[] state power on a daily basis," not because it took issue with the proposition that jobs involving the "exercise of state power" should be exempt from scrutiny under the Clause, but rather because it viewed lawyers more as private businessmen than public servants. *Id.* at 283. "We conclude that a lawyer is not an 'officer' [of the court] within the ordinary meaning of that word. He 'makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.'" *Id.*, (quoting *In re Griffiths*, 413 U.S. 717, 728-29 (1973)). Thus, the Court's reasoning in *Piper* rested on an assumption that purely public employment was not a "privilege" or "immunity" protected by the Clause.

In *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984) ("the Camden Case"), the Supreme Court considered whether employment by private contractors working on public works projects came within the purview of the Clause. In order to understand the Court's reasoning in this case, one must first be familiar with another Supreme Court case decided just one year previously, *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983). *White* involved a Commerce Clause challenge to an executive order of the Mayor of Boston requiring fifty percent of all jobs on construction projects funded by that city to be filled by city residents. In deciding whether the Commerce Clause was implicated by such a regulation, the Court found it important to determine whether the employment affected was private or public. The Commerce Clause imposes restraints on economic regulation of private parties by individual states. Thus, where a state acts

as a "market regulator" (i.e. telling private employers who they can hire), the Commerce Clause is implicated. Where a state acts instead as a "market participant" (i.e., in hiring its own employees), the Commerce Clause is not implicated. *See id.* at 207. The Court held that the employees affected by the Boston executive order, even though working for private contractors, were essentially public employees since they were paid by city funds. Therefore, since Boston was acting as a market participant rather than a market regulator, it was not subject to the restrictions of the Commerce Clause. *Id.* at 215.

In the Camden case, the Supreme Court considered a very similar ordinance in the City of Camden, New Jersey, which required forty percent of the employees of private contractors and subcontractors working on city construction projects to be Camden residents. This time, however, the challenge was based on the Article IV Privileges and Immunities Clause rather than the Commerce Clause. The defendants, invoking *White*, argued that those affected were essentially public employees and that the preference for residents was therefore constitutionally acceptable. The Court rejected this argument, "declin[ing] to transfer mechanically into [the context of the Privileges and Immunities Clause the analysis from *White*, which was] fashioned to fit the Commerce Clause," *id.* at 219, and ultimately concluded that the type of employment burdened by the Camden ordinance was "one of those Privileges and Immunities protected by the Clause," *id.* at 218, 221.

That holding is not controlling here since the case before us involves direct government employment rather than employment by government contractors. In holding that the quasi-public employment at issue in the Camden case was protected by the Clause, the Supreme Court did not conclusively answer the question we face: whether purely public employment is embraced by the Clause. An examination of the reasoning employed by the Court to reach its holding, however, should shed some light on that

question. Did the Court conclude that the employment burdened by the Camden ordinance came within the Clause because all employment, whether private or public, comes within the Clause—or because it was distinguishable from purely public employment?

Plaintiffs and defendants interpret the Court's reasoning differently on this score, and both parties have been able to find language in the opinion to support their opposing arguments. Plaintiffs argue that the Supreme Court's refusal to apply the *White* analysis in the Camden Case means that the public/private distinction has no relevance to Privileges and Immunities Clause analysis, and that burdens on all types of employment, whether private or public, implicate the Clause. Defendants argue that the Court's rejection of *White* was not a wholesale rejection of the public/private distinction itself, but merely a refusal to adopt the specific criteria set forth in *White* for determining whether a particular employment is more properly characterized as public or private. According to their interpretation, the Court found the Clause to apply to the Camden ordinance because it found employment by government contractors to be more properly characterized as private than public in this context. For the reasons set forth below, we find defendants' reading of the opinion more persuasive.

The Court began its analysis in the Camden case with two observations, which are critical to an understanding of its subsequent reasoning. First it stated that "[p]ublic employment . . . is qualitatively different from employment in the private sector." *Id.* at 219. It then went on to state, "[i]t can certainly be argued that for purposes of the Privileges and Immunities Clause everyone affected by the Camden ordinance is also 'working for the city' and, *therefore, has no grounds for complaint when the city favors its own residents.*" *Id.* (emphasis added). These initial observations set up two percepts on which the subsequent analysis rests. The first is that the distinction between public and private employment is significant.

The second is that someone who is in fact "working for the city" (a public employee) has no grounds for complaint under the Privileges and Immunities Clause; in other words, purely public employment is outside the purview of the Clause.

It is the passage immediately following this second observation on which plaintiffs rely most heavily for their argument that the Supreme Court viewed the private/public employment distinction as irrelevant to the Privileges and Immunities Clause analysis.

> But we decline to transfer mechanically into this context an analysis fashioned to fit the Commerce Clause. Our decision in *White* turned on a distinction between the city acting as a market participant and the city acting as a market regulator. The question whether employees of contractors and subcontractors on public works projects were or were not, in some sense, working for the city was crucial to that analysis. The question had to be answered in order to chart the boundaries of the distinction. But the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. The two Clauses have different aims and set different standards for state conduct.

Id. at 219-20. The Court went on to explain that the market participant/regulator distinction is important in the Commerce Clause context because the purpose of that Clause is to avoid conflict between federal and state regulation. The Privileges and Immunities Clause, on the other hand, while also aimed at prohibiting barriers to commerce between the individual states, is rooted more in the individual's right to travel from state to state to pursue her livelihood. *Id.* at 220. Thus, while the Commerce Clause focuses on the actions of the state or municipality (as either market regulator or market participant), the Privileges and Immunities Clause focuses on

the right of the individual employee to pursue her livelihood.

Plaintiffs read this passage as rejecting entirely any consideration of the distinction between public and private employment in the context of the Privileges and Immunities Clause. A better reading of this passage, however, interprets it not as rejecting the private/public employment distinction entirely, but rather as rejecting the particular approach the Court took in *White* to decide whether employment by private contractors using public funds constituted public or private employment. Nowhere in this passage did the Court use the words "public" or "private." Rather, it discussed the "distinction between the city acting as a market participant and the city acting as a market regulator." *Id.* at 219. This was the test the Court devised in *White* to draw the line between pubiic and private employment. In refusing to apply the *White* test to the Camden case, the Court was simply saying that the line between public and private would not necessarily be drawn in the same place when the Privileges and Immunities Clause was at issue as when the Commerce Clause was at issue.

Later in the opinion, the Court stated:

> The fact that Camden is expending its own funds . . . in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the Camden ordinance completely from the purview of the Clause . . . .

Id. at 221. "The fact that Camden is expending its own funds" under the *White* analysis is what would have made it a market participant and what therefore would have pushed the employment at issue over the line into the public sphere. In the Camden case, while it was a factor to be considered, "the fact that Camden [was] expending its own funds" was not enough in itself to

render the employment public and thus did not completely remove it from the purview of the Clause.

Finally, the language used by the Court in concluding its analysis indicates that it was ultimately the private nature of the employment at issue in the Camden case that brought it within the purview of the Privileges and Immunities Clause. According to the Court, "[t]he opportunity to seek employment with such *private employers* is 'sufficiently basic to the livelihood of the Nation' as to fall within the purview of the Privileges and Immunities Clause *even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city.*" *Id.* at 221-22 (emphasis added) (quoting *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978). Thus, the same type of employment that the Court considered public for purposes of the Commerce Clause was considered private for purposes of the Privileges and Immunities Clause.[4] The Court's original precept that those who are in fact "working for the city" have no cause to complain remained true, but the test for determining whether someone is working for the city had changed.

Thus, while isolated passages of the Court's opinion in the Camden case may appear to support plaintiffs' position when read out of context, a careful reading of the case as a whole demonstrates that the Court did not view the public/private distinction as irrelevant to the Privileges and Immunities Clause analysis. Rather, the Court's reasoning rested on a presumption that purely public employment would be beyond the reach of the Clause.

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[4] This is consistent with the Court's view that the Commerce Clause focuses on the perspective of the state or local government while the Privileges and Immunities Clause focuses on the perspective of the individual. *See supra* at 16. Thus, from the perspective of the Cities of Boston or Camden, the employment involved in these two cases would appear public, since the cities were disbursing public funds. From the perspective of the employee hired by a private contractor, however, the employment would appear private.

Such a precept is consistent with the Clause's purposes of preventing barriers to free trade and commerce between the states and creating a single economic union. There are significant differences between a state imposing restrictions on its own workers—as any employer has certain latitude to do—and a state forcing private employers to impose restrictions on their employees. The latter involves government restraint on the liberty of the private employers affected, and additionally has a much broader and more comprehensive impact on free trade and commerce between the states. Thus, the type of state regulation of private employment that is typically struck down under the Clause imposes a blanket burden on all persons attempting to pursue a certain livelihood. The Salem ordinance, in contrast, only affects those people seeking employment with one small employer in the state: the City of Salem. When Maryland charges more for a commercial fishing license to out-of-state residents than to state residents, anyone from out of state wishing to pursue fishing as a livelihood in Maryland is burdened. When, on the other hand, the City of Salem chooses to impose a residency requirement on clerical employees, all out-of-state residents wishing to pursue a livelihood as a secretary in New Jersey are not burdened. Indeed, the vast majority of secretarial jobs in the state remain open to out-of-state residents. Thus, commerce as a whole is not significantly affected.

Whether municipal employment comes within the purview of the Privileges and Immunities Clause presents an issue of first impression. Because Supreme Court dicta indicates that public employment is not subject to the protections of the Clause, and because we find that application of the Clause in a situation such as this—where the jobs affected represent a negligible percentage of the state's total job market—would be antithetical to the purposes and policies that animate it, we hold that the employment burdened by the Salem residency ordinance is not a "privilege" or "immunity" within the meaning

of the Clause. Summary judgment is therefore granted in favor of defendants on this claim.

B. Equal Protection Challenge

Plaintiffs also challenge the ordinance under the Equal Protection Clause of the Fourteenth Amendment. Since the ordinance does not affect a fundamental right [5] or discriminate against a protected group for purposes of equal protection analysis, plaintiffs acknowledge that the ordinance must be measured against the least strict of the equal protection standards: the rational basis test. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439-41 (1985); *Schweiker v. Wilson,* 450 U.S. 221, 230 (1981); *Dandridge v. Williams,* 397 U.S. 471, 483-87 (1970). "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne,* 473 U.S. at 440. Thus, the burden rests on those challenging the classification to show that it is not rationally related to its purpose. *See New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam).

"The State may not rely upon a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne,* 473 U.S. at 446. On the other hand, "[i]f [a] classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams,* 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Cargonic Gas Co.,* 220 U.S. 61, 78 (1911)). "[T]here is no constitutional requirement that regulations must cover every class to which they might be applied." *Wardwell v. Board of Educ.,* 529 F.2d 625, 629 (6th Cir. 1976).

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[5] *See United Bldg. & Constr. Trades Council,* 465 U.S. at 219 (no fundamental right to government employment).

The Supreme Court has held that municipal residency ordinances similar to Salem's are not irrational *per se*. *See McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646 (1976); *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972) (dismissing for lack of federal question appeal of decision by Supreme Court of Michigan rejecting equal protection challenge to municipal residency ordinance); *see also Wardwell*, 529 F.2d at 628; *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972); *Ector v. City of Torrance*, 514 P.2d 433 (Cal. 1973), *cert. denied*, 415 U.S. 935 (1974); *Kennedy v. City of Newark*, 148 A.2d 473 (N.J. 1959). Plaintiffs, however, do not argue that the classification between residents and non-residents inherent in any residency ordinance is irrational. Rather, they make a more particularized claim that the Salem ordinance is irrational to the extent that it contains so many exceptions and loopholes: police officers, fire fighters, and teachers are exempted; as well as many supervisory officials.[6] They argue that there is no rational reason why clerical and blue collar workers should be required to be Salem residents, while virtually every other employee is exempted. Moreover, they argue that the exemption of employees hired before 1978, under the grandfather provision of the ordinance, is not rationally related to any legitimate purpose.

The exemptions of police officers, firefighters, and teachers are not written into the Salem ordinance itself, but rather are mandated by state law. *See* N.J. Stat. Ann. 40A:14-122.1 (precluding imposition of municipal residency ordinances on police officers); N.J. Stat. Ann. 40A:14-9.1 (firefighters); N.J. Stat. Ann. 18A:26-1.1

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[6] These supervisory officials include the superintendent of the Water and Sewerage Department, the city building officer, the city engineer, the municipal attorney, a judge of the Salem Municipal Court, and the city's chief financial officer. There is a dispute between the parties as to whether or not the city administrator resides in the city.

(teachers). Since these classifications are created by state statutes, rather than the municipal ordinance, it is not clear that they are properly challenged in this lawsuit which is against the municipality only. *See Trainor v. City of Newark*, 368 A.2d 381, 386 (N.J. Super. Ct. App. Div. 1976). Moreover, the legislative history behind these statutes indicates that they were passed because municipal residency requirements made the recruitment of new employees more difficult. *See id.* at 475. This is a legitimate purpose to which the exemption of police and fire fighters is rationally connected.

The exemptions of supervisory officials are not mandated by state law, although some such exemptions are explicitly permitted by state statute.[7] The exemption of these positions also meets the rational basis test, however, since such positions require people with special education and skills who may not be available among the pool of Salem residents.

Finally, the distinction created by the grandfather clause between employees hired before and after 1978 serves a rational purpose by protecting the legitimate expectations of those hired before the residency ordinance's enactment, who had no warning of it prior to accepting municipal employment. We therefore find that it withstands minimum scrutiny as well. We are not alone in so holding. *See Lorenz v. Logue*, 611 F.2d 421, 423 (2d Cir. 1979); *Wardwell v. Bd. of Educ.*, 529 F.2d 625, 629 (6th Cir. 1976).

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[7] *See* N.J. Stat. Ann. 40A:9-1.1 (a "municipality may . . . appoint to office of director of public safety a nonresident of said municipality"); N.J. Stat. Ann. 40A:9-1.2 (same for municipal treasurer); N.J. Stat. Ann. 40A:9-11 ("A nonresident of any municipality may hold office as counsel, attorney, engineer, health officer, auditor, or comptroller of such municipality"); N.J. Stat. Ann. 2A:8-7 ("A magistrate who is an attorney at law need not be a resident of the municipality or municipalities to which the jurisdiction of the court extends").

C. Due Process Challenges

Plaintiffs assert five claims which they characterize as Fourteenth Amendment Due Process challenges to the ordinance. On the basis of the undisputed facts presently before us we find each of these claims is without merit as a matter of law.

Plaintiffs' first claim alleges "selective enforcement" of the Salem residency ordinance. They assert that since the ordinance's enactment in 1978, Salem has not attempted to enforce it except against plaintiff, Stephen Scull.[8] Defendant contests the factual accuracy of this assertion; but even assuming plaintiffs' version of the facts to be correct, we find no constitutional violation.

It is well-established that " 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Bordenkircher v. Hayes*, 434 U.S. 357, 668-69 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). To state such a claim, there must be evidence of intentional and purposeful discrimination on the part of the government. *United States v. Torquato*, 602 F.2d 564, 570 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979).[9] Otherwise, the mere fact that certain persons have been permitted to violate the ordinance or statute without prosecution does not

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[8] We note that although plaintiffs characterize their claim as a due process violation, claims of selective prosecution are usually analyzed under equal protection standards.

[9] Although *Bordenkircher*, *Oyler*, and *Torquato* involved selective prosecution of a criminal statute, we find application of the same standard dispositive in this case. If there is any difference between the standards for selective enforcement of civil and criminal statutes, it must be that the government is held to a higher degree of scrutiny in the criminal context since the deprivation at stake is so much more severe. Accordingly, to the extent we find that the City has not violated the more stringent criminal standard, we can be sure that it has not violated the civil standard.

preclude the government from enforcing it against others. *Abrahams v. Civil Serv. Comm'n*, 319 A.2d 483, 490 (N.J. 1974). Here plaintiffs have not adduced any evidence, nor do they allege that the City's failure to enforce the ordinance except against Stephen Scull was purposeful and intentional and "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher*, 434 U.S. at 669. Therefore, we find no constitutional violation.

Plaintiffs' second argument is that the City committed a due process violation by its failure to provide Stephen Scull with written or oral notice of the residency requirement at the time he was hired. First, we note that this is not a standard procedural due process claim challenging the government's removal of an entitlement without providing notice and an opportunity to be heard. Plaintiffs do not dispute that Stephen Scull was provided advance notice and an opportunity to be heard regarding the City's intent to terminate him for violation of the ordinance. Rather, they argue that due process standards required the City to give Mr. Scull notice of the ordinance before he was hired. Plaintiffs have offered no legal authority in support of this argument. In the absence of any authority to the contrary, we must adhere to the age-old maxim that ignorance of the law is no excuse. That rule "is 'deeply rooted in the American legal system,' and exceptions to it must not be casually created." [10] *United*

[10] The Supreme Court has only "recognized certain very limited circumstances in which a State's reliance on the maxim that a man may be presumed to know the law is not consistent with the restrictions imposed by the Constitution on legislative action." *Texaco v. Short*, 454 U.S. 516, 545 (1982) (Brennan, J. dissenting). Thus, in *Lambert v. California*, 355 U.S. 225 (1957), the Court held that a municipal ordinance which made it an offense for any convicted felon to remain in the city for more than five days without registering with the police violated due process standards when applied to someone who neither knew nor could reasonably be expected to know of her legal obligation. Critical to the Court's holding in that case, however, was the fact that the defendant had

States v. Rogers, 962 F.2d 342, 344 (4th Cir. 1992) (quoting *Cheek v. United States*, 111 S.Ct. 604, 609 (1991)); *accord, United States v. International Minerals and Chem. Corp.*, 402 U.S. 558 (1971). Thus, to the extent that notice of the residency requirement prior to hiring was constitutionally required, we hold that the existence of the statute itself was sufficient to provide such notice.

Third, plaintiffs argue that the ordinance is void for vagueness. A law will be struck down on vagueness grounds where it "lacks explicit standards for its application, and this impermissibly delegates basic policy matters to [government officials] for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Plaintiffs argue that this ordinance is void for vagueness because "the Mayor and Council have complete discretion in authorizing exemptions from Salem's resident preference, [and] the City has failed to adopt standards for the granting of such exemptions." [11] In fact, however, the Mayor and Council do not have "complete discretion" because the statute itself sets forth explicit standards for the granting of exemptions. The ordinance states:

> EXCEPTIONS. The Mayor and Common Council are hereby authorized in their discretion for good and sufficient cause being shown, to permit any officer or employee of the City of Salem to remain in the employ of the City without complying with the provisions hereof where:

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been given no opportunity to comply with the law and avoid its penalty upon first being made aware of its existence. *Id.* at 229. In this case, Stephen Scull has been given the option of moving back into Salem to comply with the municipal residency ordinance. *See* Affidavit of Thomas G. Smith, ¶ 14; Affidavit of Stephen Scull, ¶ 6.

[11] Plaintiffs' brief at 58.

> [a] The health of any officer or employee necessitates residence outside the City limits;
>
> [b] The nature of employment is such as to require residence outside the City;
>
> [c] Specialized talent or technique is required such as professional services of engineer [sic] or accountants

Indeed, the New Jersey Supreme Court has held that a municipal residency ordinance worded nearly identically to this one would not be impermissibly vague. In *Abrahams v. Civil Serv. Comm'n*, 319 A.2d 483 (N.J. 1974), the exceptions provision of a Newark residency ordinance was challenged on vagueness grounds under the United States Constitution. That ordinance contained categories for exemptions nearly identical to [a] and [b] above, in addition to a third category permitting an exemption where "[s]pecial circumstances attach." *Id.* at 484. The court held the last category void for vagueness, but found the first two categories sufficiently specific to adequately guide the discretion of the responsible officials. *Id.* at 489-90. Moreover, the court noted that had the third category specified the meaning that city officials attributed to the words "special circumstances," it would also have been sufficient to withstand the vagueness challenge. The "meaning" the court referred to was strikingly similar to section [c] of the Salem ordinance: "special talent or technique which is necessary for the operation of government not found among Newark residents." *Id.* We agree with the New Jersey Supreme Court that this language provides sufficient limits on official discretion to survive a vagueness challenge.

Fourth, plaintiffs make a cursory attempt to invoke the substantive due process right to *intra*-state travel recently recognized by the Third Circuit in *Lutz v. City of York*, 899 F.2d 255, 270 (3d Cir. 1990). We fail to see how the holding in *Lutz* offers any support to plaintiff's claim, however. There the court held that the right "to move freely about one's neighborhood or town . . . is indeed

'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history,' " and thus subject to substantive due process protection. *Id.* at 268 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) and *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)). The court further held that a municipal ordinance outlawing "cruising" (consisting of "driving repeatedly around a loop of certain major public roads through the heart of the city," *id.* at 256) burdened this right and was therefore subject to intermediate scrutiny. We see no reason to presume that the limited right recognized by the Third Circuit in that case, to move freely about one's neighborhood, would encompass the right that plaintiffs claim here: to commute from outside Salem to a job with the Salem government. Accordingly, we find this claim to be without merit as well.

Fifth and finally, plaintiffs argue that the City of Salem acted *ultra vires* in enacting the ordinance and that it is therefore void. According to this argument, the City of Salem is a creature of the state legislature and therefore has no powers beyond those provided by the state. Because state law provides that an employee who violates a municipal residency ordinance shall be given six months to resume residency before termination procedures begin, *see* N.J.S.A. 40A:9-1.5, plaintiffs argue that Salem's ordinance, which provides only ten days' notice, is *ultra vires*. *See City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). Plaintiffs characterize this as a federal due process violation but do not cite any authority for that characterization.

Defendant argues that Salem's ordinance pre-dates N.J. Stat. Ann. 40A:9-1.5, and therefore is not bound by it. Indeed, the statute states at N.J. Stat. Ann. 40A:9-1.9,

> The provisions of this act shall apply to all residency requirements adopted on and after the effective date of this act. Nothing herein shall be construed as to alter, abrogate, repeal or otherwise affect any resi-

> dency requirement in effect in any local unit by ordinance . . . on the effective date of this act [June 30, 1978].

Plaintiffs argue in response that since the enabling legislation under which Salem's ordinance was originally enacted has now been repealed, the City must comply with the current statutory provision, but they offer no authority for this proposition. In the absence of any such authority we are understandably disinclined to disregard the apparently clear import of the statuory language cited above. Accordingly, we find this claim without merit as well.

Finally, plaintiffs assert that to the extent the ordinance violates the federal constitution it also violates the state constitution. Since we find no federal constitutional violation, and plaintiffs have given us no reason to believe that the New Jersey Constitution's reach is broader than that of the federal constitution with respect to these claims, summary judgment is also granted to defendants with respect to plaintiffs' claims under the New Jersey Constitution.

III. *Conclusion*

For the reasons set forth above, we find that there are no disputed issues of material fact and that as a matter of law Salem's residency ordinance does not violate the Privileges and Immunities Clause of Article IV, the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the United States Constitution, or any provisions of the New Jersey Constitution. We therefore grant summary judgment in favor of defendants as to all counts.

/s/ John F. Gerry
JOHN F. GERRY
Chief Judge

DATED: September 13, 1993

[Filed Sep. 13, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 92-1137

SALEM BLUE COLLAR WORKERS ASSOCIATION and STEPHEN SCULL,

Plaintiffs,

v.

THE CITY OF SALEM; MAYOR and COMMON COUNCIL OF SALEM; MAYOR LEON JOHNSON; CITY OF SALEM COMMON COUNCIL MEMBERS, JOHN BURKE; ROBERT DAVIS; ROBERT ELK; BETSY ERHARDT; EARL GAGE; ROBERT JOHNSON; DONALD SHARP; and JOSEPH WEAVER, individually and in their official capacities,

Defendants.

ORDER

This matter having come before the court on motion by plaintiffs for summary judgment and cross-motion by defendants for summary judgment, and the court having considered the submissions of the parties, and for good cause shown;

It is, this 13th day of September, 1993, hereby ORDERED that plaintiffs' motion is DENIED and defendants' motion is GRANTED. Summary judgment is therefore entered in favor of defendants on all counts.

/s/ John F. Gerry
JOHN F. GERRY
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5622

SALEM BLUE COLLAR WORKERS ASSOCIATION; and STEPHEN SCULL,

Appellants,

v.

THE CITY OF SALEM; LEON JOHNSON, Mayor of the City of Salem; JOHN BURKE, Common Council Member of the City of Salem; ROBERT DAVIS, Common Council Member of the City of Salem; ROBERT ELK, Common Council Member of the City of Salem; BETSY ERHARDT, Common Council Member of the City of Salem; EARL GAGE, Common Council Member of the City of Salem; ROBERT JOHNSON, Common Council Member of the City of Salem; DONALD SHARP, Common Council Member of the City of Salem; JOSEPH WEAVER, Common Council Member of the City of Salem, individually and in their official capacities,

Appellees.

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil Action No. 92-cv-01137)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SEITZ,* *Circuit Judges*

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Mansmann would grant rehearing.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

Dated: Sep. 28, 1994

*** Hon. Collins J. Seitz, United States Circuit Judge, was limited to voting for panel rehearing.**

AN ORDINANCE REQUIRING CITY OF SALEM EMPLOYEES TO BE RESIDENTS OF THE CITY OF SALEM, IN THE STATE OF NEW JERSEY, AS A CONDITION OF EMPLOYMENT

WHEREAS, the rate of unemployment in the City of Salem is among the highest in the State of New Jersey; and

WHEREAS, by reason thereof it is in the best interests of the residents of the Ctiy of Salem, that its officers and employees be residents of said City; and

WHEREAS, it is acknowledged that such a residency requirement as a condition of employment is proper and advantageous to the City of Salem; and

WHEREAS, said residency will not only reduce the high unemployment rate in the City, but will also improve relations among City employees; enhance the quality of employee performance by greater personal knowledge of conditions and problems in the City; promote a feeling of greater personal interest in the City's progress; reduce the possibility of tardiness and absenteeism; provide a ready availability of trained manpower for emergency situations; and provide unto the City economic benefits;

NOW THEREFORE, BE IT ORDERED by the Mayor and Common Council of the City of Salem, in the County of Salem, State of New Jersey, as follows:

SECTION 1: RESIDENT DEFINED. For the purpose of this ordinance a resident is a person permanently domiciled within the City of Salem; a domicile which has not been adopted with the intention of taking up or claiming a previously residence within the City.

SECTION 2: RESIDENCE REQUIRED. Except as otherwise provided by law, all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem, are hereby required as

a condition of their employment to have their place of abode in the City of Salem and be a bonafide domicilary therein.

SECTION 3: EXCEPTIONS. The Mayor and Common Council are hereby authorized in their discretion for good and sufficient cause being shown, to permit any officer or employee of the City of Salem to remain in the employ of the City without complying with the provisions hereof where:

[a] The health of any officer or employee necessitates residence outside the City limits;

[b] The nature of employment is such as to require residence outside the City;

[c] Specialized talent or technique is required such as professional services of engineer or accountants;

[d] Any person employed by the City who resides outside the City as of the date of the adoption of this ordinance; such person who subsequently makes his residence within the City shall not be exempt from the requirements of this ordinance.

SECTION 4: COMPLIANCE.

[a] Failure of any officer or employee, except as provided by law, to comply with this regulation shall be deemed, regardless of tenure or Civil Service status, sufficient cause for removal or discharge from the service of the City;

[b] The Mayor and Common Council of the City of Salem or its duly authorized agent is hereby authorized to investigate into the residency of any officer, employee, or appointee of the City and to require said officer, employee, or appointee to produce proof of bona-fide residence within the City of Salem;

[c] As a condition of employment, each and every employee or prospective employee shall be required to

execute an affidavit, in form prescribed by the Mayor and Common Council, setting forth, inter alia, that said employee is domiciled in the City of Salem;

[d] Any municipal officer, employee, or appointee shall be given a ten [10] day notice setting forth the charge that the employee is not a bona-fide resident of the City of Salem and shall be discharged on account thereof. Said notice shall provide that the employee shall be entitled to a full hearing on account of said employee's residency and said notice shall set forth the time and place when said hearing shall be held.

SECTION 5: SEVERABILITY. In the event any section of this Ordinance shall be declared to be illegal or unconstitutional by a Court of competent jurisdiction, such declarations shall not in any manner prejudice the enforcement of the remaining provisions.

This ordinance shall take effect according to law.

/s/ Kenneth R. Lewis
KENNETH R. LEWIS
Mayor

NOTICE

Notice is hereby given that the foregoing ordinance was introduced at a regular meeting of the Mayor and Common Council of the City of Salem, held on Monday, March 6, 1978, and at a regular meeting to be held on Monday, March 20, 1978, at 7:30 p.m., said Mayor and Common Council will hold a public hearing at the Freeholders Room of the Salem County Court House, 94 Market Street, Salem, New Jersey, to consider said ordinance for final passage.

/s/ Lee M. Munyon
LEE M. MUNYON
Recorder

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5622

SALEM BLUE COLLAR WORKERS ASSOCIATION
and STEPHEN SCULL,
Appellants,

v.

CITY OF SALEM; LEON JOHNSON, Mayor of the City of Salem; JOHN BURKE, Common Council Member of the City of Salem; ROBERT DAVIS, Common Council Member of the City of Salem; ROBERT ELK, Common Council Member of the City of Salem; BETSY ERHARDT, Common Council Member of the City of Salem; EARL GAGE, Common Council Member of the City of Salem; ROBERT JOHNSON, Common Council Member of the City of Salem; DONALD SHARP, Common Council Member of the City of Salem; JOSEPH WEAVER, Common Council Member of the City of Salem, individually and in their official capacities,
Appellees.

Appeal from the United States District Court
for the District of New Jersey

D.C. Civil No. 92-1137

Present: Sloviter, *Chief Judge,* Hutchinson and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on May 2, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 15, 1993, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: August 25, 1994